Supreme Court, U.S.
FILED

06-1043 DEC 4 - 2006

OFFICE OF THE CLERK

Case No._____

IN THE SUPREME COURT
FOR THE UNITED STATES OF AMERICA

JOHN FABIANO,
Petitioner,

v.

WILLIAM ARMSTRONG,
and
THE COLORADO BUREAU OF
INVESTIGATION,
Respondents.

On Writ of Certiorari to the Colorado Supreme Court case number 06SC243

PETITION FOR A WRIT OF CERTIORARI

Jonathan S. Willett
The Equitable Building
730 17th Street, Suite 350
Denver, Colorado 80202
(303) 832-5648
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

1. Whether Petitioner, who was acquitted by a federal jury of possession of child pornography, but convicted regarding the same transaction of receipt of child pornography over the internet, was consistently with due process of law and his constitutional right to a jury trial, required to register as a sex offender pursuant to Colo. Rev. Stat. §16-22-103(1)(b), which expressly requires registration for persons convicted of possession and not simple receipt of sexually exploitive material pursuant to Colo. Rev. Stat. §§18-6-403(3)(b.5) & 18-6-403(2)(j)?

LIST OF PARTIES

In the Supreme Court of Colorado, John Fabiano was the Petitioner, William Armstrong and the Colorado Bureau of Investigation were the Respondents.

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CITATION OF LOWER COURT OPINIONS

On January 26, 2006, Division A of the Colorado Court of Appeals issued a published opinion in case number 2004CA2552 (*Fabiano v. Armstrong*, 114 P.3d 907 (Colo. App. 2006)(Appendix "D"), affirming the judgment of the trial court that the defendant be required to register as a sex offender. A copy of the opinion is attached hereto. The Colorado Supreme Court declined to review the case on a writ of certiorari by Order dated

September 11, 2006 (case number 06SC243)(Appendix "E'). The Colorado Court of Appeals issued its mandate on September 18, 2006.

STATEMENT OF JURISDICTION

The judgment of the Colorado Supreme Court denying application for certiorari issued September 11, 2006 and the Mandate issued from the Colorado Court of Appeals on its judgment on September 18, 2006. No Petitions for Rehearing are permitted on denial of a Petition for a Writ of Certiorari in the Colorado Supreme Court. However, a Petition for Rehearing was filed in the Colorado Court of Appeals and denied by that Court on March 16, 2006. The state petition for a writ of certiorari was timely filed on May 17, 2006, after an extension of time was granted due to the medical condition of Petitioner's counsel.

Jurisdiction on certiorari is appropriate because pursuant to S. Ct. Rules 10(a), (b) & (c) the Colorado Court of Appeals decided important federal questions involving due process of law and the federal right to jury

trial in a manner that calls for invocation of this Court supervisory power, in a way that conflicts with decisions of other state courts, and because the question has not heretofore been settled by this Court, but should be to resolve discrepancies in application of the lower court decisions. Jurisdiction in this case is expressly based upon the lower court's construction of the federal due process clause and the right to jury trial as embodied in the United States Constitution.

REASONS FOR GRANTING THE WRIT

The Constitution of the United States guarantees all individuals the right to due process of law and the right to a jury trial on serious criminal accusations. In this case, Petitioner was tried by a jury in the United States District Court for Colorado on fifteen counts. After the trial, Petitioner was convicted of two counts of receipt of child pornography. Petitioner was acquitted of all other

counts, which included possession of child pornography. The Colorado statute, Colo. Rev. Stat. §18-3-412.5 (Appendix "F") requires sex offender registration for persons found guilty of possession of child pornography.

The Colorado Court of Appeals contorted the federal jury's findings and concluded that a conviction for receipt is a conviction for possession because they were not persuaded "the federal jury verdict acquitting Mr. Fabiano of possession establishes that he did not in fact possess child pornography." This construction second guesses the meaning of the jury's verdict and amounts to a denial of the right to due process guaranteed by the Fifth and Fourteenth amendments to the Constitution as well as the Constitutional right to a jury trial to determine guilt.

Jurisdiction on certiorari is appropriate because pursuant to S. Ct. Rules 10(a), (b) & (c) the Colorado Court of Appeals decided important federal questions

involving due process of law and the federal right to jury trial in a manner that calls for invocation of this Court supervisory power, in a way that conflicts with decisions of other state courts, and because the question has not heretofore been settled by this Court, but should be to resolve discrepancies in application of the lower court decisions

STATEMENT OF THE CASE AND FACTS

Following a jury trial, Petitioner was convicted of two counts of knowing receipt of child pornography in violation of 18 U.S.C. § 2252(a)(2) in the United States District Court for Colorado, case number 96-CR-502-Z on February 20, 1998. See Judgment in Appendix "A." Petitioner was acquitted of all of the other counts charged in the indictment, which specifically included possession of child pornography.

Mr. Fabiano's acquittal as to possession related to

whether he actually possessed digital images of children. Petitioner was convicted of receipt of child pornography based upon the testimony of F.B.I. agents, who confirmed by a search of America On Line server records that he was sent child pornography over the internet; however, based upon the search and inventory of computers, discs, and all the contents seized from Mr. Fabiano's home, no child pornographic images were possessed by Mr. Fabiano. The Colorado seizure occurred when Mr. Fabiano was in California, providing him no opportunity to delete or otherwise destroy any image that he was allegedly sent. The foregoing facts are established by the transcripts of the trial, which were agreed to by the parties in the Court below. See District Court Order in Appendix "B."

After a complete evidentiary hearing, including an evaluation by a state certified provider, the Honorable

Zita Weinschienk found and ordered that Petitioner was not a sex offender, nor was he required to undergo offense specific treatment pursuant to the state sex offender guidelines. See Zita Weinscheink's Order of November 6, 2002, Appendix "C."

Nevertheless, Petitioner had been required to register as a sex offender by the Broomfield Police Department. The Broomfield Police Department in consultation with the Broomfield County Attorney decided they did not want to continue to require Mr. Fabiano to register as a sex offender. However the Colorado Bureau of Investigation continued to require Mr. Fabiano to register.

On October 3, 2003, Mr. Fabiano petitioned the District Court for the City and County of Denver for an Order declaring that he is not required to register. The parties filed a joint motion to brief the issue raised,

because the facts were not in dispute, and were based upon attachments to the original petition. Petitioner filed an Opening Brief. Respondent filed a Response Brief. Petitioner filed a Reply Brief. On October 25, 2004, the Trial Court issued an Order denying the claim.

The appeal to the Court of Appeals followed. The Court of Appeals reasoned that even in this internet age, one cannot receive an image without possessing it. Opinion attached as Appendix "D." The Court of Appeals stated: "Nor are we persuaded by plaintiff's claim that the federal jury's verdict acquitting him of the possession charge establishes that he did not in fact possess child pornography." Opinion attached as "D."

Additional facts will be added in the argument where necessary.

DISCUSSION

THE FEDERAL JURY VERDICT ACQUITTING MR. FABIANO OF POSSESSION OF BUT CONVICTING HIM OF RECEIPT CANNOT, CONSISTENTLY WITH DUE PROCESS, BE RE-INTERPRETED TO FIT THE COLORADO STATUTES THAT REQUIRE REGISTRATION FOR POSSESSION ONLY.

C.R.S. § 18-3-412.5 sets forth the requirements of registration for sex offenders. The statute creates a number of categories of persons who must register as sex offenders. Those categories are: a) any person convicted in the State of Colorado of a sexual offense as defined in § 18-3-411(1) or sexual enticement of a child; b) Any person convicted of a sexual offense in another jurisdiction that would constitute a sexual offense in Colorado as defined by C.R.S. § 18-3-411(1) or

enticement of a child; c) Any person released from the custody of the Department of Corrections having served a sentence for a sexual offense as defined in § 18-3-411(1) or sexual enticement of a child; and d) any person convicted of sexual assault, enticement of a child, incest, aggravated incest, trafficking in children, sexual exploitation of children, procurement of a child for sexual exploitation, indecent exposure, soliciting for child prostitution, pandering of a child, procurement of a child, keeping a place of child prostitution, pimping of a child, inducement of child prostitution, patronizing a prostituted child, and sexual conduct in a penal institution. C.R.S. § 18-3-412.5(1)(a)(I), (II), (III), & (1)(b)(I).

Mr. Fabiano was not convicted of any of the above enumerated offenses. Of the charges listed in paragraph five above, the only Colorado offense that comes close to paralleling Mr. Fabiano's federal conviction is sexual

exploitation of children, C.R.S. § 18-6-403. Subsection (3) of C.R.S. § 18-6-403 defines, in relevant part, sexual exploitation of a child as occurring if a person knowingly a) causes or permits a child to be engaged in sexually explicit conduct for any commercial purpose or the creation of sexually exploitive material, b) prepares, publishes, distributes, offers, makes, finances, sells, exhibits or advertises sexually exploitative material, and b.5) possesses or controls any sexually exploitative material for any purpose.

Petitioner's conviction was for receipt of pornographic images. He was acquitted of possession of the same images. Therefore, his receipt of such digitized files was fleeting at best. By its plain language, receipt of child pornography only is not forbidden by the state statute governing sexual exploitation of a child, C.R.S. § 18-6-403. Therefore, Mr. Fabiano has not been convicted

of a qualifying offense or act for his registration as a sex offender to be required under C.R.S. § 18-3-412.5.

In Colorado as in most states, a Court's fundamental responsibility in interpreting a statute is to give effect to the intent of the general assembly. *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001)(*citing Reg'l Transp. Dist. v. Lopez*, 916 P.2d 1187 (Colo. 1986)); *Lakeview Assocs. v. Maes*, 907 P.2d 580, 584 (Colo. 1995)). The first step in statutory construction is the language of the statute itself. *Martin, supra*. If there is no ambiguity in the legislative purpose from the plain language of the statute, then further rules of statutory construction are not necessary. *Id.* Sexual offender registration is a creature of statute and must therefore abide by the terms of that statute. *Cf. People v. Brockelman*, 933 P.2d 1315, 1318 (Colo. 1997).

In this case, the legislature listed the offenses that

trigger the registration requirement and mere receipt of child pornography without possession or dissemination is not listed. Therefore, a construction of the plain meaning of the statute does not support any registration requirement for Petitioner.

In *People v. Meidinger*, 987 P.2d 937 (Colo. App. 1999), the Court of Appeals used this plain meaning construction of the statute defining "sex offender," and concluded if the conviction is not for one of the enumerated offenses, it is not a sex offense. *Meidinger*, *supra*, 987 P.2d at 938. Here, the reasoning of *Meidinger* applies, and the Petitioner was not convicted of a sex offense listed in order to trigger the registration requirement. "The law's requirement turns on an offender's conviction alone–a fact that a convicted offender already has had an opportunity to contest. No other fact is relevant to the disclosure of the registrant's

information." *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160,1165 (2004).

In *Meidinger,* the Colorado Court of Appeals also ruled, construing the statute, that a person with a history of sexual behavior may be considered a sexual offender. *Id.* In this case, unlike in *Meidinger*, Petitioner has no history of sexual offenses.

The Colorado Supreme Court, in *People v. Rockwell*, 125 P.3d 410, 418 (2005), stated that the concept of a "factual basis" requires a reviewing court to uphold factual determinations based upon jury findings. There are only three ways to establish a factual basis of unlawful sexual behavior– facts admitted by defendant, facts or fact finding stipulated by a defendant, or found by a jury. *Id.*

Also, to the extent there is an ambiguity in the construction of the registration statute, that ambiguity

must be resolved in favor of the Petitioner. The Rule of Lenity requires that ambiguities in criminal statutes be resolved in favor of the person whose liberty rights are affected. *Fields v. Suthers*, 984 P.2d 1167, 1172 (Colo. 1999). In the context of this case, the legislature has extensively and particularly delineated what offenses generate a registration requirement. Despite the legislative particularity employed in drafting, there is no comparable violation in the Colorado Criminal Code for simple receipt of child pornography over the internet.

The trial court and the Court of Appeals, in rejecting Mr. Fabiano's claims, opined that the fact that defendant knowingly received child pornography means that at some point he possessed or controlled child pornography. This construction flies in the face of the reality of the computer age, where files are received by people all the time, but quickly deleted. Indeed, in this

case, the lack of any illegal files in Mr. Fabiano's computer shows that if he ever received illegal images, he quickly dis-possessed himself of them. In Colorado, the word "retain" is relevant to criminal possession, and the criminal possession must be continuing. *People v. Zuniga*, 80 P.3d 965, 969-970 (Colo. App. 2003).

Moreover, the Colorado Court of Appeals had recognized the concept of "transitory possession." *People v. Barry*, 888 P.2d 327, 330 (Colo. App. 1994)(citing *People v. Mijares*, 6 Cal. 415, 422, 99 Cal. Rptr. 139, 144, 491 P.2d 1115, 1120 (1971)). Nevertheless, the Court of Appeals in this case mis-applied *Barry*, stating that there is "no minimum time requirement" for possession. But the *Barry* court made no such statement. Rather, it declined to apply the concept of transitory possession to one who disposes of drugs to avoid detection. *Barry*, supra at p. 330-331. Therefore, the

reconstruction of the federal jury's verdict (acquitting Mr. Fabiano of possession) based upon the conclusion that if he received, he must have at one time possessed, is a strained and erroneous interpretation of the law as well as a denial of federal and state due process and his right to a jury trial under the federal and state constitutions.

Other important considerations support the conclusion that Mr. Fabiano is not required to register. Mr. Fabiano underwent a Federal Court-Ordered psycho-sexual evaluation and was determined by the United States District Court of Colorado not to be in need of sex offender treatment or subject to the Colorado State sex offender management board guidelines. This process included evaluations by such notable experts in the area as Dr. Robert Atwell, and Dr. Spencer Friedman. These observations, the Rule of Lenity, and the plain language of the statute suggest the analysis employed by the lower

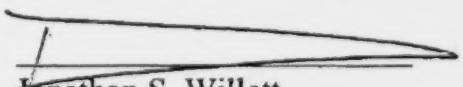
courts was an inductive effort to re-interpret the federal court proceedings. This is especially true since the federal jury heard all the evidence, considered all the charges. The rulings of the federal court in this regard are the "law of the case." *E.g., People v. Zuniga*, 80 P.3d 965, 969-970 (Colo. App. 2003).

Finally, a number of other courts have applied these principals and found that registration requirements inapplicable where they are not based upon facts admitted or facts found by a jury. *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004); *People v. Tye*, 206 Cal. Rptr. 813, 816, 160 Cal. App. 796, 802-803 (1984); *People v. Saunders*, 232 Cal. App. 1592, 1597-98, 284 Cal. Rptr. 212, 215 (5th Dist. App. 1991); *People v. Rogers*, 197 Ill. App. 3d 722, 144 Ill. Dec. 156, 555 N.E. 2d 53, 55-56 (1990).

CONCLUSION

This interesting and important matter of first impression raises important considerations about due process, the right to jury trial, as well as statutory interpretation with a lifelong consequence for the people involved. The decisions of the court that have addressed the issues involved are inconsistent. Accordingly, for all the foregoing reasons, Petitioner requests that this Court issue a writ of certiorari to the Colorado Supreme Court.

Respectfully submitted,



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Attorney for Petitioner

APPENDIX "A"

Federal Judgment

UNITED STATES DISTRICT COURT
District of Colorado

Case Number 96-CR-502-Z

UNITED STATES OF AMERICA

v.

JOHN FABIANO
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JOHN FABIANO, was represented by David Lane, Retained.

The defendant has been found not guilty on count(s) One, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen and Fifteen and is discharged as to such count(s).

The defendant was found guilty on counts(s) Two and Three after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section: 18 USC 2252(a)(2)

Nature of Offense: KNOWING RECEIPT OF A VISUAL DEPICTION OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT (VIA THE INTERNET)

Date Offense Concluded: 9/10/96

Count Number(s): Two, Three

As pronounced on February 2, 1998, the defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $200.00, for count(s) Two and Three, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 19th day of Feb , 1998.

/S/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Judge
United States District Court

Defendant's Date of Birth: November 16, 1954
Defendant's address: 1139 ASPEN STREET,
BROOMFIELD, COLORADO 80020

Defendant: JOHN FABIANO
Case Number: 96-CR-502-Z

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months.

The Court makes the following recommendations to the Bureau of Prisons: Defendant be designated to FPC Englewood, CO for service of sentence.

The defendant shall surrender to the designated facility no later than 12:00 noon on Monday, March 2, 1998.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: JOHN FABIANO
Case Number: 96-CR-502-Z

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall not possess a firearm or destructive device; shall comply with the standard conditions that have been adopted by this Court (set forth below).

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on supervised release and at least two periodic drug tests thereafter as directed by the probation officer.

o The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

The defendant shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district in which the

defendant is released within 72 hours of release form the custody of the Bureau of Prisons.

2. Defendant shall undergo a mental health evaluation, specifically an offense specific evaluation pursuant to the guidelines established by the Sex Offender Treatment Board for the State of Colorado (which includes polygraph examinations as required by the evaluating and/or treatment agency).

3. Defendant shall not possess, or use, a computer with access to any "on-line computer service" at any location (including employment) without prior written approval of the Probation Department. This includes any Internet service provider, bulletin board system, or any other public or private computer network.

4. Defendant shall comply with the State of Colorado Sex Offender Registration requirements for convicted sex offenders pursuant to Colorado Revised Statutes 18-3-412.5.

No fine is imposed because defendant has no ability to pay a fine.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persona engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement agency without the permission of the court.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification s and to confirm the defendant's compliance with such notification requirement.
14) The defendant shall provide the probation officer with access to any requested financial information.

Defendant: JOHN FABIANO
Case Number: 96-CR-502-Z

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	17
Criminal History Category:	I
Imprisonment Range:	24 to 30 months
Supervised Release Range:	2 to 3 years
Fine Range:	$5,000 to $50,000
Restitution:	$-0-

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart form the sentence called for by application of the guidelines.

APPENDIX "B"

District Court Order

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street Denver, Colorado 80202 **Petitioner:** John Fabiano v. **Respondents:** William Armstrong and the Colorado Bureau of Investigation	▲ ▲ **COURT USE ONLY** Case Number: 03CV7629 Ctrm: 5
ORDER	

THIS MATTER comes before the court on petitioner John Fabiano's petition and complaint pursuant to C.R.C.P. 106 or, alternatively, for a declaratory judgment. The court, having considered the record, petition, response, and reply, and otherwise being fully apprised in the premises, finds as follows:

Pursuant to C.R.S. § 16-22-103, one who is convicted of an "unlawful sexual offense" must register as

a sex offender. Pursuant to C.R.S. § 18-3-411(1), an "unlawful sexual offense" includes "sexual exploitation of a child" as defined in C.R.S § 18-6-403. Pursuant to C.R.S. § 18-6-403(3)(b.5), a person commits sexual exploitation of a child if that person "possesses or controls" graphic materials depicting a child engaged in sexual conduct.

Plaintiff was prosecuted in federal court and convicted of "receiving" child pornography under 18 U.S.C. § 2252(a)(2), and was found not guilty of "possessing" child pornography under 18 U.S.C. § 2252(a)(4)(B). As a result of plaintiff's conviction, defendant is requiring that culpable mental state requirement that the receipt of materials be "knowingly" ensures that a person who receives child pornography without his knowledge or consent and who promptly deletes or destroys such materials cannot be convicted of knowingly receiving child pornography if he received

such materials under innocent circumstances. Thus, the fact that plaintiff was convicted of knowingly receiving child pornography necessarily establishes that at some point, plaintiff possessed or controlled child pornography materials and that such possession was not accidental or for innocent purposes.

The fact that plaintiff was not convicted of "possession" of child pornography is not relevant. Receiving child pornography as defined by federal statutes necessarily results in possession or control as defined by Colorado statutes. This is true regardless of whether or not plaintiff was convicted of possession under the federal statute. Therefore, the court finds that petitioner, John Fabiano, is not entitled to a declaratory judgment ordering that he is not required to register as a sex offender in the state of Colorado.

DATED AND SIGNED this 25th day of October, 2004.

BY THE COURT:

/S/ Lawrence A. Manzanares
Lawrence A. Manzanares
District Court Judge

APPENDIX "C"

Federal District Court Order of 11-6-02

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Criminal Action No. 96-CR-502-Z

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN FABIANO,

Defendant.

ORDER

The matter before the court is Defendant's Motion To Clarify Sentence Or Alternatively To Correct Clerical Error, filed October 16, 2002. Consistent with the judgment in this case issued on February 19, 1998, and the Court's letter to Defendant's wife on July 29, 1999, Defendant must comply with the state requirements set forth in Colorado Revised Statutes § 18-3-412.5. The federal judgment does not require defendant to register as a sex offender. Whether or not state law requires Defendant to register is a state issue and not for this Court to decide.

The April 3, 2001, Order determined that Defendant did not have to undergo treatment in a state-approved sex offender treatment program as part of his supervised release. Further clarification is unnecessary, and this Court finds no clerical error. Accordingly, it is

ORDERED that Defendant's Motion To Clarify Sentence Or Alternatively To Correct Clerical Error is denied.

DATED at Denver, Colorado, this 6 day of November, 2002.

BY THE COURT:

/S/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Senior Judge
United States District Court

November ____, 2002

Criminal Action No. 96-CR-502-Z

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the above date copies of ORDER entered by Judge Zita L. Weinshienk and filed on November 7, 2002, were mailed or hand delivered to the following:

James Russell
Assistant U.S. Attorney
DC Box 16

Dennis W. Hartley Esq.
1749 South 8th Street, Suite 5
Colorado Springs, CO 80906

Probation Department
Attn: Joni A. Bedell

U.S. Marshal
Attn: David Floyd

Andrew Vogt
Assistant U.S. Attorney
DC Box 28

Jonathan S. Willett, Esq.
Willett & Mestas, LLC
847 Sherman Street
Denver, CO 80203

JAMES R. MANSPEAKER, Clerk
By _____
Deputy Clerk

APPENDIX "D"

Colorado Court of Appeals Opinion

COLORADO COURT OF APPEALS

Court of Appeals No.: 04CA2552
City and County of Denver District Court No. 03CV7629
Honorable Lawrence A. Manzanares, Judge

John Fabiano,

Plaintiff-Appellant,

v.

William Armstrong and the Colorado Bureau of Investigation,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division A
Opinion by: JUDGE NIETO*
Davidson, C.J., and Rovira*, J., concur

Announced: January 26, 2006

Willett & Mestas, LLC, Jonathan S. Willett, Denver, Colorado, for Plaintiff Appellant

John W. Suthers, Attorney General, John A. Lizza, Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2005.

In this declaratory judgment and C.R.C.P. 106 action, plaintiff, John Fabiano, appeals the judgment in favor of defendants, the Colorado Bureau of Investigation (CBI) and William Armstrong, in his official capacity as the CBI agent charged with responsibility for maintaining the state sex offender registry. We affirm.

The facts are not in dispute. Plaintiff was convicted in the United States District Court for the District of Colorado of two counts of knowing receipt (via the internet) of a visual depiction of a minor engaged in sexually explicit conduct. See 18 U.S.C. § 2252(a)(2). The conduct that resulted in these convictions occurred at different times of day on September 10, 1996. Plaintiff was acquitted of other counts alleging receipt and transmission of images of minors engaging in sexually explicit sexual conduct, specifically: ten counts of violating 18 U.S.C. § 2252(a)(2) at various times on August 2, October 24, and October 27, 1996; and two

counts of violating 18 U.S.C. § 2252(a)(1) at various times on October 24, 1996. Plaintiff was also acquitted of one count of violating 18 U.S.C. § 2252(a)(4)(b), alleging that on December 11, 1996, he knowingly possessed computer files and other matter containing visual depictions of minors engaging in sexually explicit conduct.

The following facts related to plaintiff's convictions are gleaned from his two federal appeals. Plaintiff participated in an internet chat room in which participants discussed and exchanged visual images of child pornography via e-mail. The principal method of delivering the images was to send them to participants who were "listed" in the chat room. Plaintiff requested to be "listed," and on September 10, 1996 he received two e-mail messages containing images of children engaged in sexual acts. Thereafter, he continued to log on to the chat room. United States v. Fabiano, 42 F. App'x 408 (10th

Cir. 2002); United States v. Fabiano, 169 F.3d 1299 (10th Cir. 1999).

The CBI subsequently determined that plaintiff was statutorily obligated to register with the state sex offender registry because of his federal convictions. Plaintiff challenged that determination by filing this petition for relief pursuant to C.R.C.P. 106 or , alternatively, for declaratory judgment.

The trial court ruled, based on uncontested facts, that plaintiff was obligated to register as a sex offender. Accordingly, the court denied relief, and this appeal followed.

I.

Plaintiff contends that the trial court erred by concluding that his federal convictions for knowing receipt of child pornography obligate him to register as a sex offender. He argues that he was convicted of knowingly receiving prohibited sexual material but acquitted of possessing such material. Therefore, he argues, his federal convictions cannot constitute the offense of possession or control of sexually exploitative material. We disagree.

The trial court's ruling was based entirely on a statutory interpretation. Therefore, our review is de novo. Medina v. State, 35 P.3d 443 (Colo. 2001).

Section 16-22-108(1)(a), C.R.S. 2005, provides that "[e]ach person who is required to register [as a sex offender] pursuant to section 16-22-103 shall register with the local law enforcement agency in each jurisdiction in which the person resides."

Section 16-22-103(1)(b), C.R.S. 2005, requires sex offender registration by, among others, "[a]ny person who was convicted on or after July 1, 1991, in another state or jurisdiction, including but not limited to a military or federal jurisdiction, of an offense that, if committed in Colorado, would constitute an unlawful sexual offense, as defined in section 18-3-411(1), C.R.S."

Sexual exploitation of a child as defined in § 18-6-403, C.R.S. 2005, is one of the offenses listed in § 18-3-411(1), C.R.S. 2005.

The federal statute under which plaintiff was convicted provides, in relevant part, that a person commits a crime if he

> knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if –

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual depiction is of such conduct.

18 U.S.C. § 2252(a)(2).

The trial court reasoned that a person who committed the federal offense for which plaintiff was convicted would, if the conduct occurred in Colorado, also commit "sexual exploitation of a child, as described in § 18-6-403," which is one of the offenses enumerated in § 18-3-411(1). We agree with the trial court's conclusion.

"A person commits sexual exploitation of a child if, for any purpose, he or she knowingly…[p]ossesses or controls any sexually exploitative material for any purpose." Section 18-6-403(3)(b.5), C.R.S. 2005. "Sexually exploitative material" is defined as "any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, chemically, or

digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct." Section 18-6-403(2)(j), C.R.S. 2005.

According to plaintiff, his federal conviction for knowing receipt of a visual depiction of a minor engaged in sexually explicit conduct does not necessarily constitute the Colorado offense of sexual exploitation of a child because the federal offense can be committed without possessing the sexually explicit materials, and possession or control is a necessary element of the Colorado offense. In support of this claim, plaintiff notes that the jury that found him guilty of knowing receipt of a visual depiction of a minor engaged in sexually explicitly conduct also acquitted him of a separate charge of possession of a visual depiction of a minor engaged in sexually explicit conduct. We are not persuaded.

We conclude, as a matter of law, that a person convicted of violating 18 U.S.C. § 2252(a)(2) has engaged in conduct that, if committed in Colorado, would constitute sexual exploitation of a child in violation of § 18-6-403(3)(b.5) and is, therefore, subject to the registration requirement of § 16-22-103(1)(b).

Under the particular circumstances here, we reject plaintiff's argument that he could have received the child pornography in a "fleeting" manner that would not constitute "possession" of the material. We acknowledge that receipt of an unsolicited e-mail containing previously unknown material that is immediately deleted from the receiver's computer may not constitute possession of the material in the e-mail. However, the idea of nonpossessory receipt is inherently illogical where as here, plaintiff requested the e-mail and knew in advance the nature of its contents.

As relevant here, the word "receive" means "to take possession or delivery of" or "to come into possession of." Webster's Third New International Dictionary 1894 (1986). Thus, the concept of "possession" is included in the word "receive." Furthermore, evidence that a person has knowingly received prohibited material in an e-mail could be accepted as proof that the person knowingly possessed the material because a person who knowingly receives an e-mail is aware of the nature of its content and has immediate and knowing dominion or control over it. See CJI-Crim. 36(11) (1993 Supp.) (defining possession as "the actual, physical possession, or the immediate and knowing dominion or control over the object or the thing allegedly possessed").

The jury that convicted plaintiff of the federal offenses was specifically instructed that "[i]n this case, the term 'knowingly' refers to an awareness of the

sexually explicit nature of the material, and to the knowledge that the visual depictions were in fact of minors engaged in that sexually explicit conduct." The jury was also instructed that "the term 'knowingly received' includes knowing acceptance of requested material" and "'[k]nowing receipt' means more than simply having e-mail sent to a computer." United States v. Fabiano, supra, 169 F.3d at 1303-04. Thus, plaintiff's federal convictions required proof that he received the child pornography with an awareness of the nature of the material and that he accepted the material with knowledge of its nature.

This conduct is identical to that prohibited by § 18-6-403(2)(j), which prohibits a person from knowingly possessing or controlling sexually exploitative material. Under this statute "knowingly" means an awareness both that the person is possessing or controlling certain material and that the material is sexually exploitative. See

§ 18-1-501(6), C.R.S. 2005 ("A person acts 'knowingly'…with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.").

We also note that neither the federal nor the Colorado statutes contain any requirement that the prohibited material be retained for any minimum period of time. See People v. Barry, 888 P.2d 327 (Colo. App. 1994)(rejecting an argument that temporary or fleeting possession of a controlled substance did not constitute possession of the substance).

Nor are we persuaded by plaintiff's claim that the federal jury's verdict acquitting him of the possession charge establishes that he did not in fact possess child pornography.

First, plaintiff was convicted of receiving the child pornography on September 10, 1996. The charge of

possession of child pornography alleged that he possessed it on December 11, 1996, three months after the conduct that resulted in his conviction. Even if these charges related to the same pornographic material, acquittal for conduct on December 11 does not necessarily mean that it was not possessed on September 10.

Second, subject to an exception not applicable here, it is well established in Colorado that inconsistent verdicts of guilt and acquittal do not provide a criminal defendant with a basis for relief because the inconsistency may be attributable to unrelated factors such a mistake, compromise, or lenity. People v. Frye, 898 P.2d 559, 569 (Colo. 1995). This same rule governs plaintiff's federal convictions, as was noted by the panel of the Tenth Circuit that upheld the denial of plaintiff's motion for postconviction relief. United States v. Fabiano, supra, 42 F. App'x at 414 ("Inconsistent verdicts do not provide a basis for relief."). Thus, the federal jury's verdict

acquitting plaintiff on the charge of possessing child pornography does not constitute a finding that he received the child pornography without also possessing it.

II.

Plaintiff next argues that the CBI was without authority to determine whether he is obligated to register as a sex offender, and that the agency's action constitutes a violation of separation of powers principles, because the judicial branch of government is vested with exclusive jurisdiction to make such determinations. We conclude this claim is now moot because this proceeding has resulted in a judicial determination that plaintiff must register. See People v. Miller, 94 P.3d 1197, 1203 (Colo. App. 2004)(an issue on appeal is moot when the relief, if granted, would have no practical effect on the controversy).

The judgment is affirmed.

CHIEF JUDGE DAVIDSON and JUSTICE ROVIRA concur.

APPENDIX "E"

Colorado Supreme Court Order denying Petition

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 CERTIORARI TO THE COURT OF APPEALS, 04CA2552 DISTRICT COURT, CITY & COUNTY OF DENVER, 03CV7629	CASE NO. 06SC243
Petitioner: JOHN FABIANO, v. **Respondents:** WILLIAM ARMSTRONG and COLORADO BUREAU OF INVESTIGATION.	
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, September 11, 2006.
Justice Eid does not participate.

Copies mailed via the State's Mail Services Division on 09/11/06. klm

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Clerk of the Court
Colorado Court of Appeals

APPENDIX "F"

Applicable Colorado Revised Statutes

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→ C.R.S.A. § 18-3-412.5. Failure to register as a sex offender

(1) Any person who is required to register pursuant to article 22 of title 16, C.R.S., and who fails to comply with any of the requirements placed on registrants by said article, including but not limited to committing any of the acts specified in this subsection (1), commits the offense of failure to register as a sex offender:

(a) Failure to register pursuant to article 22 of title 16, C.R.S.;

(b) Submission of a registration form containing false information or submission of an incomplete registration form;

(c) Failure to provide information or knowingly providing false information to a probation department employee, to a community corrections administrator or his or her designee, or to a judge or magistrate when receiving notice pursuant to section 16-22-106(1), (2), or (3), C.R.S., of the duty to register;

(d) If the person has been sentenced to a county jail, otherwise incarcerated, or committed, due to conviction of or disposition or adjudication for an offense specified in section 16-22-103, C.R.S., failure to provide notice of the address where the person intends to reside upon release as required in sections 16-22-106 and 16-22-107, C.R.S.;

(e) Knowingly providing false information to a sheriff or his or her designee, department of corrections personnel,

or department of human services personnel concerning the address where the person intends to reside upon release from the county jail, the department of corrections, or the department of human services. Providing false information shall include, but is not limited to, providing false information as described in section 16-22-107(4)(b), C.R.S.;

(f) Failure when registering to provide the person's current name and any former names;

(g) Failure to register with the local law enforcement agency in each jurisdiction in which the person resides upon changing an address, establishing an additional residence, or legally changing names;

(h) Failure to provide the person's correct date of birth, to sit for or otherwise provide a current photograph or image, to provide a current set of fingerprints or to provide the person's correct address;

(i) Failure to complete a cancellation of registration form and file the form with the local law enforcement agency of the jurisdiction in which the person will no longer reside.

(2)(a) Failure to register as a sex offender is a class 6 felony if the person was convicted of felony unlawful sexual behavior, or of another offense, the underlying factual basis of which includes felony unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute felony unlawful sexual behavior if committed by an adult, or for another offense, the underlying factual basis of which involves felony unlawful sexual behavior; except that any

second or subsequent offense of failure to register as a sex offender by such person is a class 5 felony.

(b) Any person convicted of felony failure to register as a sex offender shall be sentenced pursuant to the provisions of section 18-1.3-401. If such person is sentenced to probation, the court shall require, as a condition of probation, that the person participate until further order of the court in an intensive supervision probation program established pursuant to section 18-1.3-1007. If such person is sentenced to incarceration and subsequently released on parole, the parole board shall require, as a condition of parole, that the person participate in an intensive supervision parole program established pursuant to section 18-1.3-1005.

(c) A person who is convicted of a felony sex offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, and who commits failure to register as a sex offender in this state commits felony failure to register as a sex offender as specified in paragraph (a) of this subsection (2) and shall be sentenced as provided in paragraph (b) of this subsection (2).

(3)(a) Failure to register as a sex offender is a class 1 misdemeanor if the person was convicted of misdemeanor unlawful sexual behavior, or of another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior. A class 1 misdemeanor conviction pursuant to this subsection (3) is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501(3).

(b) A person who is convicted of a misdemeanor sex offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, and who commits failure to register as a sex offender in this state commits misdemeanor failure to register as a sex offender as specified in paragraph (a) of this subsection (3).

(4)(a) Any juvenile who receives a disposition or is adjudicated for a delinquent act of failure to register as a sex offender that would constitute a felony if committed by an adult shall be sentenced to a forty-five-day mandatory minimum detention sentence; except that any juvenile who receives a disposition or is adjudicated for a second or subsequent delinquent act of failure to register as a sex offender that would constitute a felony if committed by an adult shall be placed or committed out of the home for not less than one year.

(b) Any juvenile who receives a disposition or is adjudicated for a delinquent act of failure to register as a sex offender that would constitute a misdemeanor if committed by an adult shall be sentenced to a thirty-day mandatory minimum detention sentence; except that any juvenile who receives a disposition or is adjudicated for a second or subsequent delinquent act of failure to register as a sex offender that would constitute a misdemeanor if committed by an adult shall be sentenced to a forty-five-day mandatory minimum detention sentence.

(5) For purposes of this section, unless the context otherwise requires, "unlawful sexual behavior" has the same meaning as set forth in section 16-22-102(9), C.R.S.

(6)(a) When a peace officer determines that there is probable cause to believe that a crime of failure to register as a sex offender has been committed by a person

required to register as a sexually violent predator in this state pursuant to article 22 of title 16, C.R.S, or in any other state, the officer shall arrest the person suspected of the crime. It shall be a condition of any bond posted by such person that the person shall register pursuant to the provisions of section 16-22-108, C.R.S., within five business days after release from incarceration.

(b) When a peace officer makes a warrantless arrest pursuant to this subsection (6), the peace officer shall immediately notify the Colorado bureau of investigation of the arrest. Upon receiving the notification, the Colorado bureau of investigation shall notify the jurisdiction where the sexually violent predator last registered. The jurisdiction where the sexually violent predator last registered, if it is not the jurisdiction where the probable cause arrest is made, shall coordinate with the arresting jurisdiction immediately to determine the appropriate jurisdiction that will file the charge. If the sexually violent predator is being held in custody after the arrest, the appropriate jurisdiction shall have no less than five business days after the date of the arrest to charge the sexually violent predator.

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→ C.R.S.A. § 16-22-103. Sex offender registration—required—applicability—exception

(1) Effective July 1, 1998, the following persons shall be required to register pursuant to the provisions of section 16-22-108 and shall be subject to the requirements and other provisions specified in this article:

(a) Any person who was convicted on or after July 1, 1991, in the state of Colorado, of an unlawful sexual offense, as defined in section 18-3-411(1), C.R.S., or enticement of a child, as described in section 18-3-305, C.R.S.;

(b) Any person who was convicted on or after July 1, 1991, in another state or jurisdiction, including but not limited to a military or federal jurisdiction, of an offense that, if committed in Colorado, would constitute an unlawful sexual offense, as defined in section 18-3-411(1), C.R.S., or enticement of a child, as described in section 18-3-305, C.R.S.; and

(c) Any person who was released on or after July 1, 1991, from the custody of the department of corrections of this state or any other state, having served a sentence for an unlawful sexual offense, as defined in section 18-3-411(1), C.R.S., or enticement of a child, as described in section 18-3-305, C.R.S.

(2)(a) On and after July 1, 1994, any person who is convicted in the state of Colorado of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior, or any person who is released from the custody of the

department of corrections having completed serving a sentence for unlawful sexual behavior or for another offense, the underlying factual basis of which involved unlawful sexual behavior, shall be required to register in the manner prescribed in section 16-22-104, section 16-22-106 or 16-22-107, whichever is applicable, and section 16-22-108.

(b) A person shall be deemed to have been convicted of unlawful sexual behavior if he or she is convicted of one or more of the offenses specified in section 16-22-102(9), or of attempt, solicitation, or conspiracy to commit one or more of the offenses specified in said section.

(c)(I) For convictions entered on or after July 1, 2002, a person shall be deemed to be convicted of an offense, the underlying factual basis of which involves unlawful sexual behavior, if:

(A) The person is convicted of an offense that requires proof of unlawful sexual behavior as an element of the offense; or

(B) The person is convicted of an offense and is eligible for and receives an enhanced sentence based on a circumstance that requires proof of unlawful sexual behavior; or

(C) The person was originally charged with unlawful sexual behavior or with an offense that meets the description in sub-subparagraph (A) or (B) of this subparagraph (I), the person pleads guilty to an offense that does not constitute unlawful sexual behavior, and, as part of the plea agreement, the person admits, after advisement as provided in subparagraph (III) of this paragraph (c), that the underlying factual basis of the

offense to which he or she is pleading guilty involves unlawful sexual behavior; or

(D) The person was charged with and convicted of an offense that does not constitute unlawful sexual behavior and the person admits on the record, after advisement as provided in subparagraph (III) of this paragraph (c), that the underlying factual basis of the offense involved unlawful sexual behavior.

(II) If a person is originally charged with unlawful sexual behavior or with an offense that meets the description in sub-subparagraph (A) or (B) of subparagraph (I) of this paragraph (c), the court may accept a plea agreement to an offense that does not constitute unlawful sexual behavior only if:

(A) The district attorney stipulates that the underlying factual basis of the offense to which the person is pleading guilty does not involve unlawful sexual behavior; or

(B) The person admits, after advisement as provided in subparagraph (III) of this paragraph (c), that the underlying factual basis of the offense to which he or she is pleading guilty involves unlawful sexual behavior.

(III) The advisement provided for purposes of this paragraph (c), in addition to meeting the requirements of the Colorado rules of criminal procedure, shall advise the person that admitting that the underlying factual basis of the offense to which the person is pleading or of which the persons is convicted involves unlawful sexual behavior will have the collateral result of making the person subject to the requirements of this article. Notwithstanding any provision of this paragraph (c) to the

contrary, failure to advise a person pursuant to the provisions of this subparagraph (III) shall not constitute a defense to the offense of failure to register as a sex offender if there is evidence that the defendant had actual notice of the duty to register.

(IV) In any case in which a person is deemed to have been convicted of an offense, the underlying factual basis of which involves unlawful sexual behavior, as provided in this paragraph (c), the judgment of conviction shall specify that the person is convicted of such an offense and specify the particular crime of unlawful sexual behavior involved.

(V) The provisions of this paragraph (c) shall apply to juveniles for purposes of determining whether a juvenile is convicted of an offense, the underlying factual basis of which involves unlawful sexual behavior.

(d) Notwithstanding any other provision of this section any stipulation by a district attorney and any finding of the court with regard to whether the offense of which a person is convicted includes an underlying factual basis involving unlawful sexual behavior shall not limit or otherwise affect the ability of the department of corrections to make such determination in accordance with department procedures for purposes of classification and treatment of any person sentenced to the department of corrections.

(3) In addition to the persons specified in subsections (1) and (2) of this section, any person convicted of an offense in any other state or jurisdiction, including but not limited to a military or federal jurisdiction, for which the person, as a result of the conviction, is required to register if convicted in Colorado, shall be required to register in the

manner specified in section 16-22-108, so long as such person is a temporary or permanent resident of Colorado. Such person may petition the court for an order that discontinues the requirement for registration in this state at the times specified in section 16-22-113 for offense classifications that are comparable to the classification of the offense for which the person was convicted in the other state or jurisdiction.

(4) The provisions of this article shall apply to any person who receives a disposition or is adjudicated a juvenile delinquent based on the commission of any act that may constitute unlawful sexual behavior or who receives a deferred adjudication based on commission of any act that may constitute unlawful sexual behavior; except that, with respect to section 15-22-113(1)(a) to (1)(e), a person may petition the court for an order to discontinue the duty to register as provided in those paragraphs, but only if the person has not subsequently received a disposition for, been adjudicated a juvenile delinquent for, or been otherwise convicted of any offense involving unlawful sexual behavior. In addition, the duty to provide notice to a person of the duty to register, as set forth in sections 16-22-105 to 16-22-107, shall apply to juvenile parole and probation officers and appropriate personnel of the division of youth corrections in the department of human services.

(5)(a) Notwithstanding any provision of this article to the contrary, if, pursuant to a motion filed by a person described in this subsection (5) or on its own motion, a court determines that the registration requirement specified in this section would be unfairly punitive and that exempting the person from the registration requirement would not pose a significant risk to the community, the court, upon consideration of the totality

of the circumstances, may exempt the person from the registration requirements imposed pursuant to this section if:

(I) The person was younger than eighteen years of age at the time of the commission of the offense; and

(II) The person has not been previously charged with unlawful sexual behavior; and

(III) The offense, as charged in the first petition filed with the court, is a first offense of either misdemeanor unlawful sexual contact, as described in section 18-3-404, C.R.S., or indecent exposure, as described in section 18-7-302, C.R.S.; and

(IV) The person has received a sex offender evaluation that conforms with the standards developed pursuant to section 1611.7-103(4)(f), from an evaluator who meets the standards established by the sex offender management board, and the evaluator recommends exempting the person from the registration requirements based upon the best interests of that person and the community; and

(V) The court makes written findings of fact specifying the grounds for granting such exemption.

(b) Any defendant who files a motion pursuant to this subsection (5) or the court, if considering its own motion, shall provide notice of the motion to the prosecuting district attorney. In addition, the court shall provide notice of the motion to the victim of the offense. Prior to deciding the motion, the court shall conduct a hearing on the motion at which both the district attorney and the victim shall have opportunity to be heard.

(6) Any person who is required to register pursuant to this section and fails to do so or otherwise fails to comply with the provisions of this article may be subject to prosecution for the offense of failure to register as a sex offender, as described in section 18-3-412.5, C.R.S. Failure of any governmental entity or any employee of any governmental entity to comply with any requirement of this article shall not constitute a defense to the offense of failure to register as a sex offender if there is evidence that the defendant had actual notice of the duty to register.

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